UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADT SECURITY SERVICES, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 347

Cases 18–CA–253853
18–CA–255233
18–CA–259314

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for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case principally arises from a dispute over the amount of money three employees were entitled to be paid while on short-term disability leave. Service technicians and installers employed by ADT Security Services, Inc. (the Respondent) in Des Moines, Iowa are covered by a collective-bargaining agreement between the Company and the International Brotherhood of Electrical Workers Local 347 (the Union). The agreement contains a chart setting forth the percentage of pay an employee will receive based upon years of service and the number of weeks the employee was temporarily disabled. It is a straightforward formula requiring nothing more than a calculator to determine the benefit amount. But the pay chart is not the only contract provision addressing short-term disability benefits. The agreement also states that the Respondent will offer bargaining-unit employees disability benefits "comparable to the majority of ADT employees." The majority of ADT employees are covered by the Respondent's short-term disability policy and are paid the

benefit amounts listed therein. Although the contractual benefit and policy benefit essentially were identical until 2014, the Respondent twice reduced the short-term disability benefit for a majority of its employees thereafter. When a Des Moines service technician went on short-term disability leave in 2019, he was paid the reduced benefit amount in the policy, not the contractual benefit in the chart. Eventually, the Union learned that two other employees likewise had not been paid the contractual benefit amount when on short-term disability leave. Multiple grievances and information requests followed.

The General Counsel's complaint in this case alleges the Respondent modified the parties' collective-bargaining agreement within the meaning of Section 8(d) of the National Labor Relations Act (the Act), in violation of Section 8(a)(5) and (1), when it reduced the rates for bargaining-unit employees' short-term disability benefits in November 2019. The Respondent defends by saying that it has a "sound arguable basis" for interpreting the collective-bargaining agreement as giving it the unilateral right to change unit employees' short-term disability benefits. I conclude that, in light of the contract language, bargaining history, and the parties' conduct, the Respondent's contract interpretation is colorable. Thus, no violation of the Act occurred in this regard. I also conclude that the Respondent did not, as alleged in the complaint, refuse to process grievances the Union filed in November 2019. However, the Respondent did violate Section 8(a)(5) and (1) by unlawfully refusing to provide relevant information that the Union requested in November and December 2019.[1]

On September 2 and 3, 2020, I heard this case, via videoconferencing. On October 23, 2020, the General Counsel and the Respondent filed posthearing briefs, which I have read and considered. On the entire record, I make the following findings of fact and conclusions of law.[2]

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[1] On June 3, 2020, the General Counsel, through the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a consolidated complaint against the Respondent in Cases 18–CA–253853 and 18–CA–255233. On July 17, 2020, the Acting Regional Director for Region 18 issued a second complaint against the Respondent in Case 18–CA–259314 and an order consolidating that case with the prior two cases. The complaints were premised upon unfair labor practice charges and amended charges filed by the Union on December 27, 2019, January 27, 2020, April 17, 2020, and July 9, 2020. On June 17, 2020 and July 31, 2020, the Respondent filed answers to the complaints, denying the substantive allegations. The Respondent admitted in its answers that the Board has jurisdiction in this case, it is a Sec. 2(2), (6), and (7) employer, and the Union is a Sec. 2(5) labor organization.

The General Counsel's complaint and the Respondent's answer in Case 18–CA–259314 were inadvertently omitted from the formal papers. I add them to the record as GC Exhs. 1(t) and 1(u). I also add to the record, as GC Exh. 1(v), my July 22, 2020 order requiring the hearing in this case to be conducted by videoconferencing and the order attachment containing my hearing safeguards.

[2] In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

ALLEGED UNFAIR LABOR PRACTICES

FINDINGS OF FACT

The Respondent is engaged in the business of installing and servicing security and fire alarm systems in residential and commercial properties throughout the United States, including from a facility located in Des Moines, Iowa. Ten people work in that facility. Since 2003, the Union has been the exclusive bargaining representative of all full-time installers and maintenance employees there. The most recent collective-bargaining agreement between the Respondent and the Union ran from September 1, 2017 to August 31, 2020. At the end of November 2019, the bargaining unit consisted of approximately four employees. James Nixdorf is ADT's senior director of labor relations for the entire country, a position he had held since 2015. The Respondent has employed Nixdorf since 2005. He is responsible for negotiating and administering all the Respondent's roughly 30 collective-bargaining agreements nationwide. Nixdorf works from Boca Raton, Florida. For the past 7 or 8 years, Patrick Wells has been the business manager for the Union, and, since January 2017, Scott Farnsworth has been its assistant business manager. Working from Des Moines, Farnsworth negotiates and administers contracts, as well as investigates, files, and processes grievances.[3]

The Respondent and the Union negotiated the Des Moines 2017-2020 collective-bargaining agreement in August 2017. Farnsworth was part of a union negotiating team led by assistant business manager Doug Buchman. It was the first time Farnsworth was involved in contract negotiations with ADT. Nixdorf bargained on behalf of the Respondent. The parties reached an agreement in 1 day. During the negotiations, they did not discuss unit employees' short-term disability (STD) benefits.[4]

A. Contract Provisions and the Respondent's Plans and Policies on STD Benefits

Article 17, section 3 of the parties' last collective-bargaining agreement stated the following concerning STD benefits:

> All regular full-time employees will be eligible after one year of continuous service for the following schedule of short-term disability benefits commencing on the eighth calendar day of absence for any non-work-related injuries or illnesses:

If Your Length of Service Is:	You Receive 100% of Pay For:	And Then 66% of Pay For:
90 days but less than 2 years	0 weeks	25 weeks
2 years but less than 5 years	10 weeks	15 weeks

[3] Tr. 26–27, 31, 33, 154–155, 252–253, 291; GC Exhs. 1(k), 2 (pp. 3, 16).

[4] Tr. 33–38, 140–141, 254–255; GC Exh. 3.

5 years but less than 10 years	15 weeks	10 weeks
10 years but less than 15 years	20 weeks	5 weeks
15 years or more	25 weeks	5 weeks

This exact table has been in the collective-bargaining agreement since September 1, 2005. Section 4 of article 17, which has been in the contract since 2003, states:

> It is agreed that the Employer's sickness discipline/dismissal policy is considered part of the Collective Bargaining Agreement. This policy, or any other policy, may change during the term of this agreement if the ADT policy changes.[5]

Also, since 2003, article 10 of the parties' contract has addressed the "Plan for Associates' Pensions, Disability Benefits and Death Benefits." Prior to 2008, the article stated:

> The Employer hereby agrees that the provisions of the plans covering employee's pensions, disability benefits and death benefits, as amended, subject to all limitations and qualifications therein contained, are hereby incorporated in and made part of this collective-bargaining agreement. The Employer shall not, during the term of this Agreement, terminate this plan. The Employer, however, reserves the right to alter or modify the plan.

On August 20, 2008, the Respondent and the Union agreed to modify the language in article 10 as follows (changes in bold and italicized):

> The Employer hereby agrees that the provisions of the plans covering employee's pensions ***(401k)***, disability benefits and death benefits, as amended, subject to all limitations and qualifications therein contained, are hereby incorporated in and made part of this collective-bargaining agreement. ~~***The Employer shall not, during the term of this Agreement, terminate this plan. The Employer, however, reserves the right to alter or modify the plan.***~~ ***The Employer agrees to offer benefits listed above comparable to the majority of ADT employees.***[6]

Nixdorf participated in the 2008 bargaining over this provision for the Respondent, but Farnsworth did not for the Union. At the time of the negotiations, the Respondent was owned by Tyco International, which had other subsidiaries with different 401(k) plans and employer matching contributions. Prior to bargaining, Tyco decided to implement a universal 401(k) match of 5 percent for employees throughout its subsidiaries, including ADT. For the Des

[5] Tr. 147, 256, 259–260; GC Exh. 2, p. 11–12; R. Exh. 2, p. 12; CP Exhs. 99, p. 12 and 100, p. 12.

[6] R. Exhs. 2 (p. 6), 3; GC Exh. 2, p. 8.

Moines employees, the 5-percent match would have been an increase. However, because article 10 did not reference the 401(k) plan, the change initially was not made there. During bargaining, the Union sought the 5-percent match, as well as adding language to article 10 to ensure that unit employees automatically received any increases to 401(k) or the other listed benefits. The Respondent was willing to do so, but only if unit employees would be subject to the same changes in benefits as the majority of ADT employees nationwide. This would include increases and decreases in benefits or even termination of a benefit plan. Believing that benefits were more likely to go up than down and willing to take what other ADT employees would get, the Union agreed, and the parties modified the language of article 10 as described above.[7]

Since the 2008 changes to article 10, the STD benefits chart in article 17, section 3 has remained the same, stating unit employees would receive a combination of 100-percent pay or 66-percent pay for a period of up to 30 weeks.[8]

The Respondent's disability plan (the "STD plan") referenced in article 10 and in effect from at least November 2018 to the present also sets forth STD benefits for ADT employees, as reflected in the company's "STD policy." The Respondent has maintained an STD policy since at least 2012. In that year, the STD policy provided benefits essentially identical to article 17, section 3 of the Des Moines contract. The policy called for a combination of 100-percent pay or 66.6-percent pay for a period of up to 25 weeks based on years of service. However, the Respondent later revised its STD policies to reduce the STD benefit compared to what was in the contract. On January 1, 2015, the Respondent changed the STD policy to reflect a combination of 80-percent pay or 66.6-percent pay for a period of up to 25 weeks based upon years of service. On March 1, 2018, the Respondent changed the STD policy to 60-percent pay for 6 months, irrespective of years of service.[9] The STD policies all also contained a reservation of rights clause, stating: "The Company has the sole right to amend, modify, terminate or discontinue the policy at any time and to any extent it may deem advisable, as designated by written instrument." In addition, both the STD plan and STD policies stated that they did not apply to employees covered by a collective-bargaining agreement unless that agreement provided for coverage under or participation in the STD policy.[10]

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[7] Tr. 260–268, 313–314, 332–336. I credit Nixdorf's testimony regarding the parties' discussion at the bargaining table over art. 10 in 2008. The testimony is uncontroverted, as neither the General Counsel nor the Union called a witness present for the 2008 negotiations or provided an explanation for the lack of a witness on this subject. Moreover, Nixdorf's demeanor when providing this testimony was assured, reflecting reliability.

[8] GC Exh. 2, p. 11.

[9] It appears that the STD benefit changes were made prior to issuance of revised STD policies reflecting the changes. The first STD benefit change was implemented in 2014, but the STD policy was not changed until January 1, 2015. (R. Exh. 5, p. 1 of 2015 policy; R. Exh. 6, p. 44.) Likewise, the second STD benefit change was implemented in 2017, but the STD policy was not updated until March 1, 2018. (R. Exh. 5, p. 1 of 2018 policy; GC Exh. 7(b).)

[10] Information about the Respondent's STD plan is based upon the summary plan description for the plan. (CP Exh. 96.) The plan itself is not in the record, but the evidence establishes that the plan and policy reflect consistent terms and the same STD benefit level for employees. (Tr. 288, R. Exh. 5.)

From 2012 to present, the Respondent paid benefits to employees nationwide as detailed in its STD policies. This included the Des Moines facility, where, during that timeframe, unit employees never received the benefits called for in article 17, section 3 of the collective-bargaining agreement. When it made changes to the benefit levels in the STD plan/STD policies, the Respondent notified the Union via email of those changes.[11]

Next, the parties' contract contains a grievance procedure with three steps: (1) a unit employee orally reports an alleged contract violation to the employee's direct supervisor within 5 days of the breach; if the verbal discussion does not resolve the grievance, the employee and shop steward may submit it in writing to the supervisor within 3 days and the supervisor has 5 days to respond in writing; (2) if not resolved at step 1, the Union's chief steward may refer the matter in writing to the "next appropriate level of management" within 3 days and management has 10 days to respond in writing; and (3) if not resolved at step 2, the Union's business representative may refer the grievance in writing to the Respondent's regional human resources director within 5 days and the director has 10 days to respond. If a grievance is not resolved after step 3, either party may request to take the grievance to arbitration. For all steps in the grievance procedure, the failure of a party to answer an appeal in the time limits specified permits the opposing party to immediately move the grievance to the next step.[12]

The arbitration clause in the parties' contract states:

> …any dispute which either directly or indirectly involves the interpretation or application of the plans covering pensions, disability benefits and death benefits shall not be arbitrable.

The Respondent sought the arbitration exclusions in this section because the specified benefit plans, including STD, exist nationwide and the Company did not want individual arbitration decisions that would affect its ability to administer the plans uniformly across the country.[13]

B. The Union's November and December 2019 Grievances Over STD Benefits and A Supervisor Performing Bargaining-Unit Work

From the end of April to the middle or end of October 2019, Terry Muhlstein, a service technician at the Des Moines facility, went on short-term disability leave.[14] At the time and as noted above, the Respondent's STD plan and policy stated that employees would be paid 60 percent of their pay for a maximum of 6 months while on STD. On November 7, Muhlstein filed a step 1 grievance by emailing his supervisor, Eric Patterson, who has been the

[11] Tr. 256, 275–286, 337–339. The Respondent's notifications to the Union of changes in STD benefits were emails of either the annual benefits guide to employees showing the changes or a chart showing the old and new benefit. (GC Exh. 7(b); R. Exh. 6, pp. 10, 44, 58).

[12] GC Exh. 2, pp. 4–5.

[13] GC Exh. 2, p. 5; Tr. 258.

[14] All dates hereinafter are in 2019, unless otherwise specified.

matrix/operations manager for the Respondent's Des Moines facility since April 2019. Muhlstein told Patterson that article 17, section 3 of the contract stated he should have been paid 100 percent of his pay for the first 15 weeks of STD leave and 66 percent for the next 10 weeks, but he only was paid 60 percent. Patterson forwarded Muhlstein's question to Leslie Tatum, then a human resources (HR) coordinator assigned to the Des Moines facility. Following discussions with her supervisor, Tatum responded to the grievance on November 8, telling Muhlstein that article 17, section 3 "used to be the policy" but that it no longer was. She said that, pursuant to article 17, section 4, the STD policy changed to employees receiving 60 percent of their pay. She included the language of section 4 which, as noted above, states that any policy "may change during the term of this agreement if the ADT policy changes." That same day, Tatum consulted with Caroline Vassey, an HR manager for ADT's south-central region. Vassey told her that Muhlstein should be paid an additional 34 percent in STD benefits. Tatum then emailed Muhlstein and told him to disregard the previous email she sent him where she stated that Muhlstein only would receive 60 percent of his pay for STD. However, the Respondent subsequently did not provide Muhlstein with any additional STD pay.[15]

On November 11, Farnsworth notified Nixdorf, Tatum, and Tim Huffman, the group general manager whose territory included the Des Moines facility, that the Union was moving Muhlstein's STD grievance to step 2. He filed a written grievance with Huffman, stating that Muhlstein was not paid STD benefits according to article 17, section 3 of the contract and was seeking to be made whole. On November 12, Huffman told Farnsworth that the grievance had been resolved at step 1, but Farnsworth responded that the Union would not withdraw the grievance until Muhlstein got paid.[16]

That same day, Huffman responded again and changed course, telling Farnsworth that, upon review of the grievance, the Respondent maintained that the STD pay it provided Muhlstein was consistent with the contract. Huffman referred to article 10 which, as previously noted, states that the "provisions of the plans" covering employee's disability benefits are incorporated into the contract and ADT agrees to offer disability benefits to unit employees "comparable to the majority of ADT employees." Huffman also attached an October 31, 2016, email from Nixdorf to multiple representatives from the Union, including Wells, entitled "Benefits Changes 2017." Nixdorf included a table listing numerous benefits with the current offering and the new benefit. For STD, the new benefit was "60 percent benefit" for 180 days.[17]

Also, in mid-November, Anthony Wiebelhaus, another Des Moines unit employee, called Farnsworth and told him he was going out on STD leave and an ADT representative told

[15] Tr. 49–54, 155, 184–198, 231, 357, 367–68; GC Exhs. 5, 25; CP Exhs. 88, 89, 96. The record evidence does not establish why Vassey thought Muhlstein was owed an additional 34 percent, which would not have raised his STD benefit to the contractual levels.

[16] Tr. 61–62, 219; GC Exhs. 6, 7(a).

[17] GC Exhs. 7(b) and 7(c).

him he would only be receiving 60-percent pay. Don Nelsen, another unit employee, also told Farnsworth he had been out on STD in 2013 or 2014 and never got 100-percent pay.[18]

On November 18, Farnsworth moved Muhlstein's grievance to step 3. In doing so, he told Nixdorf, Huffman, and Patterson that "ADT negotiated a new contract that is in full force and effect from September 1, 2017 till August 31, 2020" and the Union expected ADT to comply with the contract.[19]

On that same date, Farnsworth held a meeting with bargaining-unit employees, who advised Farnsworth that Patterson, their direct supervisor, was performing bargaining-unit work.[20]

On November 19, Farnsworth filed three new grievances with Nixdorf, Huffman, and Patterson. The first two grievances alleged, like the Muhlstein grievance, that the Respondent failed to pay STD benefits to Wiebelhaus and Nelsen in conformance with article 17, section 3 of the parties' collective-bargaining agreement. The third alleged that Patterson was performing bargaining unit work in violation of article 8.[21]

C. The Union's Information Requests and Further Grievance Processing

On November 25, Farnsworth moved the three new grievances to step 2, after not receiving a response to their filing. That same day, Farnsworth sent multiple information requests to Nixdorf. The first related to Muhlstein's STD grievance. Farnsworth requested the following information:

> 1. All documents which relate to, refer to or describe the Company's investigation concerning the facts considered by the Company in making its decision on how to handle grievant's short-term disability claim.
>
> 2. All documents which relate in any way to the Company's decision to not pay grievant the short-term disability benefits he is entitled to under article 17, section 3 of the Agreement entered into on

[18] Tr. 66–67.

[19] GC Exh. 7(d).

[20] Tr. 67–68, 145–146.

[21] GC Exh. 8. Art. 8 of the contract (GC Exh. 2, p. 7), entitled "Supervisory Personnel," states: Supervisory employees shall not do work in order to deprive members of the bargaining unit of jobs regularly performed by such members. This section shall not be construed to prevent supervisory employees from: (1) performing necessary functions, training, or instructions; (2) operating equipment or otherwise proceeding in respect to experimental or development work; (3) participating in direct production in emergencies which shall include but not be limited to certifications, licenses, absences for one (1) working day or part of a working day or when insufficient number of service employees are available; and (4) in emergency situations.

September 1, 2017 between the Des Moines, IA facility of ADT and the Local.

3. Please identify who made the final decision with respect to the handling of grievant's short-term disability claim and all grievance step responses from the Company.

4. All documents, including emails and notes, which demonstrate any meeting, communication or conversation between Company representatives regarding grievant's short-term disability claim.

5. All documents, including emails and notes, which demonstrate any meeting, communication or conversation between the Company and grievant regarding his short-term disability claim.

6. All documents comprising grievant's personnel file, including all documents related to his short-term disability claim.

7. Identify and produce any Company rules, policies and/or regulations relied on in the handling of grievant's short-term disability claim.

8. Identify and produce any Company procedures relied on in the handling of grievant's short-term disability claim.

9. A copy of the job description that applied to grievant.

Farnsworth twice stated that he needed the information in order to "effectively represent bargaining-unit employees." Farnsworth submitted the identical information requests for the STD grievances of Nelsen and Wiebelhaus.[22]

Farnsworth's fourth information request related to the grievance concerning Patterson performing bargaining-unit work. Farnsworth requested:

1. All documents [of] work orders/service tickets done by Eric Patterson for the last six months.

2. Any and all documents pertaining to new installations done by Eric Patterson for the last six months.

[22] GC Exhs. 8(a), 9(a), 9(b), and 9(c).

Again, Farnsworth twice stated the Union needed the information "to effectively represent bargaining unit employees."[23]

On December 2, Huffman responded to Farnsworth concerning the Patterson-doing-bargaining-unit-work grievance, asking Farnsworth to provide the specific provision of the contract which had been violated "in order to determine whether the information requested is relevant." He added that the Company "would be happy to provide any relevant information."[24]

On December 3, Farnsworth moved Nelsen's and Wiebelhaus' STD grievances, as well as the Patterson grievance, to step 3. Farnsworth also stated the Patterson grievance alleged a violation of article 8 of the collective-bargaining agreement.[25]

On that same date, Farnsworth sent an additional information request to Nixdorf. In it, Farnsworth requested:

1. Current employee list for the Des Moines Iowa branch of ADT please include name, address, telephone number, zip code and current pay scale.

2. Current team member handbook including what's only available on Inside ADT.com.

3. Don Nelsen's pay stubs from 1-1-2013 to 11-1-2013.

Farnsworth again stated he needed the information "to effectively represent employees."[26]

On December 6, the Union's attorney, Jason McClitis, emailed Nixdorf and stated the Union was referring Muhlstein's STD grievance to arbitration.[27]

On December 9, Farnsworth responded directly to Huffman's December 2 correspondence and reiterated that the Union was alleging a violation of article 8 for the Patterson grievance. He said the work orders, service tickets, and new installation documents requested by the Union were relevant to the investigation into whether Patterson had performed bargaining-unit work. He added that the information was needed "in order to police the collective-bargaining agreement." Nixdorf responded the same day, telling

[23] GC Exh. 9(d).
[24] GC Exh. 10.
[25] GC Exh. 11.
[26] GC Exh. 12.
[27] GC Exh. 13.

Farnsworth he was not sure how much of the information was readily available, but he would get back to Farnsworth once the Respondent had it together.[28]

On December 16, Farnsworth sent Nixdorf another letter. He complained that the Respondent was habitually failing to meet its duties regarding the information requests. He also noted that, because those requests related to pending grievances, the lack of response from the company was frustrating the grievance and arbitration process. Farnsworth stated the Union would file an unfair labor practice charge with the Board on December 27, "absent meaningful actions" by the Respondent to respond to the information requests.[29]

On December 19, McClitis sent Nixdorf a demand for arbitration of the Muhlstein STD grievance. Nixdorf responded the same day, asserting that the language of article 4, section 2 of the collective-bargaining agreement established that the substantive issue in the Muhlstein STD grievance could not be arbitrated. As noted above, that contract provision states that any dispute involving interpretation or application of the company's disability benefits plan, as well as issues of past practice, shall not be arbitrable. Nixdorf further stated:

> In the earlier steps, the company maintained it modified the disability plan utilizing its unilateral rights as set forth in article 10. The company's STD plan outlines the schedule of benefits for the majority of ADT employees. Given this grievance directly and/or indirectly involves the interpretation of the disability plan, it is not subject to arbitration.

As previously discussed, article 10 states that the "provisions of the plans" covering employee's disability benefits are incorporated into the contract and ADT agrees to offer disability benefits to unit employees "comparable to the majority of ADT employees."[30]

On December 27, the Union filed its first unfair labor practice charge with the Board alleging that the Respondent had unlawfully refused to provide it with information requested by the Union.

D. Communication Between the Parties Following the Union's Initial Unfair Labor Practice Charge

On December 31, the Union referred the STD grievances of Nelsen and Wiebelhaus, as well as the Patterson grievance, to arbitration. In his written notification to Nixdorf, McClitis also asked if the Respondent's position that the STD grievances were non-arbitrable meant the Company was refusing or waiving the right to arbitrate Muhlstein's grievance. He also asked if

[28] GC Exhs. 14(a), 14(b).
[29] GC Exh. 15(a).
[30] GC Exh. 16.

the Respondent's non-arbitrability position also applied to the Nelsen and Wiebelhaus grievances.[31]

On January 2, 2020, McClitis emailed Nixdorf a demand for arbitration for the Patterson grievance.[32]

On January 3, 2020, McClitis emailed Nixdorf again, attaching a panel of arbitrators for the parties to strike for the Muhlstein STD grievance. He reiterated his request from December 31 for clarification as to the Respondent's position on the arbitrability of the other STD grievances.[33]

On January 27, 2020, McClitis emailed Nixdorf and the Respondent's outside counsel, Jeremy Moritz, stating he had not received any response to his written correspondence and reiterating the Union's requests for information, striking a panel for the Patterson grievance, and ADT's position on the arbitrability of the Nelsen and Wiebelhaus grievances. Also, that day, the Union filed a second unfair labor practice charge with the Board, alleging the Respondent violated Section 8(a)(5) and (1) by frustrating the parties' grievance and arbitration process.[34]

On February 2, 2020, Moritz responded to McClitis, telling him the STD grievances were not arbitrable under article 4, section 2, as previously stated in Nixdorf's December 19 correspondence. Moritz stated the Respondent was willing to submit the procedural question of whether the STD grievances were arbitrable to an arbitrator. He said, if the Union agreed, they could strike a panel. However, he stated the Respondent was not willing to submit the merits of the STD grievances to arbitration. As to the Patterson grievance, Moritz said it did not appear the grievance was related to the STD grievances and asked McClitis to resend the arbitration panel for striking.[35]

On February 24, McClitis sent a response to Moritz. As to both the STD and Patterson grievances, McClitis stated the Union was waiting for a response to its information requests. Specific to the STD grievances, he also said that, while he understood the Respondent's stance on arbitrability, his initial inquiry was to determine the company's position on the substantive merits, because the parties' contract was unambiguous concerning what STD payments employees would receive. Finally, regarding the Patterson grievance, he said the Union was waiting to schedule a date with the Respondent to strike a panel. Moritz responded the same day, offering dates to strike the Patterson panel. As to the other identified issues, Moritz said he

[31] GC Exh. 17.
[32] GC Exh. 18.
[33] GC Exh. 19.
[34] GC Exh. 21.
[35] GC Exh. 22(a).

would "get you answers on all the rest." Having not received a response by March 9, McClitis responded to Moritz and asked him where things stood.[36]

In response to the Union's information requests, the only information the Respondent provided was a list of current employees.[37]

At the hearing in this case, Farnsworth testified that he needed the information in his requests about STD benefits to properly process the grievances of the three bargaining-unit employees. For Muhlstein, Farnsworth needed information about how the Company reached its final decision that he was not entitled to the benefits listed in the contract, because the Respondent initially told Muhlstein he would receive those additional benefits. For Nelsen, Farnsworth requested 2013 pay stubs, because that was the time period Nelsen previously was on short-term disability. Farnsworth further testified that his information request regarding the Patterson grievance was to determine if the supervisor was performing bargaining-unit work and, if so, how often he was doing it. He requested a list of bargaining-unit employees and their contact information to obtain current information regarding them. He requested an updated employee handbook, because the Union's prior copy of it was from 2006.[38]

As to the STD grievances, the Respondent refused to arbitrate the substantive merits unless an arbitrator first ruled that the issue was arbitrable. The Union has not accepted the Respondent's offer to arbitrate that procedural issue. For the Patterson grievance, the Respondent and the Union have appointed an arbitrator.[39]

ANALYSIS

I. DID THE RESPONDENT MODIFY THE PARTIES' COLLECTIVE-BARGAINING AGREEMENT?

The General Counsel's complaint alleges that the Respondent modified the parties' collective-bargaining agreement without the Union's consent and within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1), of the Act, by refusing to pay unit employees the short-term disability rates contained in the contract.

Section 8(d) provides, in relevant part, that "where there is in effect a collective-bargaining contract … no party to such contract shall terminate or modify such contract." In contract modification cases,[40] the General Counsel must show a contractual provision exists and that an employer has modified the provision or, in other words, has failed to adhere to the contract, without the consent of the other party. *Bath Iron Works Corp.*, 345 NLRB 499, 501

[36] GC Exhs. 23, 24. These were the last communications between the parties in the record.

[37] Tr. 71, 80–82, 95–96, 122–123, 226, 318–319, 350.

[38] Tr. 70–74, 80–82.

[39] Tr. 102, 115, 152–154, 175, 289–90.

[40] The General Counsel does not allege in the alternative that this constituted an unlawful unilateral change under Sec. 8(a)(5). See *ADT Security Services*, 369 NLRB No. 31, slip op. at 2–3 (2020).

(2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). When an employer has a "sound arguable basis" for its interpretation of a contract and is not motivated by animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of the two equally plausible contract interpretations is correct and ordinarily will not find a violation.[41] *Vickers, Inc.*, 153 NLRB 561, 570 (1965); see also *Metalcraft of Mayville*, 367 NLRB No. 116, slip op. at 3 (2019). In such cases, there is, at most, a contract breach, rather than a contract modification. *NCR Corp.*, 271 NLRB 1212, 1213 fn. 6 (1984).

In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. *Mining Specialists, Inc.*, 314 NLRB 268 (1994), enfd. 326 F.3d 602 (4th Cir. 2003). To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as the bargaining history of the contract provision in question or a past practice of the parties in regard to the effectuation or implementation of the provision itself. Id. at 268–269; see also *Pacific Maritime Assn.*, 367 NLRB No. 121, slip op. at 4 (2019).

The Respondent contends that article 10 of the collective-bargaining agreement gives it the unilateral right to change unit employees' STD benefits. The Respondent specifically relies on the 2008 language revision requiring that unit employees receive disability benefits "comparable to the majority of ADT employees."

I conclude that the Respondent has a sound arguable basis for its contract interpretation. Looking at the contract language, the plain meaning of the word "comparable" is something that is the same or similar/alike.[42] Thus, the Respondent must offer unit employees the same STD benefits which the majority of ADT employees receive or similar benefits to that which the majority receives.[43] Those non-unit employees are covered by the Respondent's STD policy and receive the STD benefit contained therein. The STD policy also gives the Respondent the right to terminate or modify the STD benefit for non-unit employees. As a result, if the Respondent terminated the current STD benefit nationwide for non-unit employees (60-percent pay for 180 days), the contract language would give it the right to terminate or substantially reduce the STD benefit for Des Moines unit employees. Otherwise, the benefits no longer would be

[41] Neither the General Counsel nor the Charging Party argue that the Respondent's interpretation of the contract is motivated by animus, bad faith, or an intent to undermine the Union.

[42] "Comparable," MERRIAM-WEBSTER DICTIONARY (https://www.merriam-webster.com/dictionary/comparable, last visited Dec. 15, 2020).

[43] The record evidence does not establish what number of employees constitutes a "majority" at ADT. However, pursuant to Federal Rule of Evidence 201, I take judicial notice of the Respondent's 2019 10-K annual report filed with the U.S. Securities and Exchange Commission. See *Lucky Cab Co.*, 366 NLRB No. 56, slip op. at 2, fn. 1 (2018). In that report, the Respondent stated it employed 17,500 total workers and that 8 percent of those workers were covered by a collective-bargaining agreement. Thus, the STD policy applicable to non-unit employees covered a majority of the Respondent's workforce. (https://www.sec.gov/ix?doc=/Archives/edgar/data/1703056/000170305620000013/adtinc10-k12x31x2019cl.htm, last visited 12/15/20. Search for "collective bargaining.")

comparable. Similarly, if the Respondent significantly increased or decreased the STD benefit for non-unit employees, it could do the same or something similar for unit employees to maintain a comparable benefit. Perhaps the exact point at which an increased or decreased benefit level for a majority of ADT employees ceases to be "comparable" to the contractual STD benefit amount is open to debate. But what is not is that the benefit amounts cease to be comparable when they no longer are in close proximity to one another. The changes the Respondent made to the STD benefit levels for a majority of its employees in 2014 and 2017 bear this out. The Respondent significantly reduced the maximum STD benefit that non-unit employees could receive, resulting in the amount being 29 percent less than the contractual maximum in 2014 and 47 percent less than the contractual maximum in 2017. Those differences make it reasonable to conclude that the policy and contractual benefits would no longer be "comparable," unless the Respondent likewise reduced the benefit for unit employees.[44] Accordingly, the actual contract language creates a colorable argument for the Respondent that it could unilaterally modify STD benefits for Des Moines unit employees.

The Union argues that the parties' agreement in 2008 to delete the language allowing the Respondent to modify the STD plan but prohibiting it from terminating the plan means that they intended to entirely revoke ADT's unilateral rights to change STD benefits of unit employees. I find no merit to this argument. Were it accepted, the Respondent was agreeing to language changes that provided it no benefit: unit employees would receive the increased 401(k) match and any other future increases in the benefits, including STD, listed in the article; the Respondent no longer could modify the listed benefit plans; and the Respondent still could not terminate the plans. To interpret the language deletion in that manner would mean that Nixdorf agreed to a lopsided, illogical deal. Moreover, it ignores the addition of the "comparable benefit" language. The deletion of the right to modify, but not terminate, the plan is consistent with interpreting the "comparable benefit" language as now allowing the Respondent to do both, so long as it was doing the same for the majority of its workforce.

The bargaining history of the 2008 changes to article 10 likewise supports the Respondent's contract interpretation. Based on Nixdorf's uncontroverted and credited

[44] For the mathematically inclined (and presuming I have done the calculations correctly, which is not 100-percent assured), I offer this example. In 2012, 2015, and 2017, the collective-bargaining agreement called for an STD benefit combining periods of 100-percent pay and 66-percent pay across up to 30 weeks. To simplify the math, a hypothetical employee making $52,000 annually, or $1000 per week, could receive a maximum benefit of between $16,500 ($1000 X 0.66 X 25 weeks) and $28,300 ($1000 X 25 weeks + $660 X 5 weeks), depending on years of service. In 2012, the same hypothetical employee, if covered by the STD policy, could receive a maximum benefit of between $16,650 ($1000 X 0.666 X 25 weeks) and $25,000 ($1000 X 25 weeks). At the low end, the benefit essentially is the same and, at the high end, the difference is $3300 (or a little over 12 percent less). Those benefit ranges at least arguably are similar enough to be comparable. However, in 2015, the same hypothetical employee covered by the STD policy could receive a maximum benefit amount of only $20,000 ($1000 X 0.80 X 25 weeks), or $8300 less (more than 29 percent less) than under the contract. Then in 2017, the maximum benefit amount for the hypothetical employee covered by the STD policy dropped even further to $15,000 ($1000 X 0.60 X 25 weeks), or $13,300 less (nearly 47 percent less) than under the contract.

testimony, the language changes were prompted by the Union's request in negotiations for an increase in the company's 401(k) matching contribution and any additional increase in benefits that other ADT employees received. The Respondent was unwilling to agree to that "me-too" proposal but offered to provide the same 401(k) and other benefits listed in article 10 "comparable to the majority of ADT employees." The Respondent also clarified that "comparable" could mean an increase, decrease, or termination of such benefits and the Union concurred, believing benefit increases were more likely to occur. That represents an agreement that benefits both sides, especially because, at the time, the disability benefit in article 17, section 3 and in the STD policy essentially were identical.

The parties' conduct after the 2008 language changes to article 10 also supports interpreting the contract language as giving the Respondent the right to unilaterally change STD benefits. Following the negotiations, Nixdorf notified Union representatives of the reductions in those benefits in 2014 and 2017, but the Union did not object. Moreover, the Respondent never paid STD benefits pursuant to the chart in article 17, section 3 thereafter to Des Moines unit employees. This included Nelsen all the way back in 2013, again without objection from the Union. The lack of objections is consistent with the contract permitting the Respondent's unilateral changes to those benefits.[45]

Next, the General Counsel and the Union argue that the Respondent does not have a sound arguable basis for its contract interpretation, because the STD pay chart in article 17, section 3 is unambiguous as to the pay unit employees would receive, based on their years of service, when they were on short-term disability. They further note that the chart has been in the parties' contract since the inception of the parties' bargaining relationship back in 2003, including when the three Des Moines unit employees were on STD leave. To accept the argument would require me to wear horse blinders and ignore the language in article 10. The General Counsel also correctly contends that the article 10 language does not restrict the Respondent from offering higher benefits than those received by a majority of ADT employees, if the benefits are comparable to the majority. But, as discussed above, the STD benefits listed in article 17, section 3 were not "comparable" to the STD policy benefits after the Respondent's reductions to the latter in 2014 and 2017. The article 10 language permitted the Respondent to implement the same reductions to unit employees' benefits so they would be comparable.

The Union also contends that the Respondent's interpretation lacks a sound arguable basis, because it would render article 17, section 3 superfluous. What made the STD pay chart superfluous was the combination of the parties' 2008 language changes to article 10 and the Respondent's subsequent changes to STD benefits in 2014 and 2017. The Respondent argues, and I agree, that the retention of the STD pay chart in the contract after 2008, including in the

[45] In finding that the parties' conduct supports the Respondent's contract interpretation, I acknowledge that the evidence does not establish a legal past practice regarding STD payments at the Des Moines facility. The three instances of unit employees being paid the STD policy amount is insufficient to show such a practice. Nonetheless, I find the parties' conduct to be relevant extrinsic evidence of their intent in revising the art. 10 language in 2008.

2017-2020 contract, appears to have been nothing more than an oversight by Nixdorf and the other contract negotiators back in 2008. The oversight did not come to light until Muhlstein questioned the STD benefits he received in 2019. Moreover, during the 2017 negotiations, the parties did not even discuss, let alone agree, that the continued inclusion of article 17, section 3 in the contract meant unit employees would receive those benefits, rather than the benefit of 60-percent pay for 180 days that the Respondent implemented in calendar year 2017. Finally, accepting the Union's argument still would result in a provision of the collective-bargaining agreement becoming superfluous. If article 10 does not permit the Respondent to change the STD benefit, the incorporation of the STD plan in the contract and the requirement that the Respondent offer comparable benefits is rendered meaningless when the STD benefit is reduced for a majority of ADT employees.[46]

Based upon the comparable benefit language in article 10, the negotiations over that language in 2008, and the parties' conduct following that language change, I conclude the Respondent has a sound arguable basis for its belief that the contract authorized it to unilaterally change the STD benefits of Des Moines unit employees. *American Electric Power*, 362 NLRB 803, 805 (2015) (employer had sound arguable basis, based on language and past practice, for interpreting contractual language stating unit employees "shall be permitted to participate" in the employer's benefits plans as requiring employer to offer the same benefits to unit and non-unit employees, including any increases, decreases, or termination of those benefits); *Bath Iron Works*, 345 NLRB at 503 (employer had a colorable basis for interpreting a collective-bargaining agreement to permit it to unilaterally merge the company's pension plan with its corporate parent, where contract language arguably resulted in plan documents being incorporated into the agreement and those plan documents gave the employer the right to terminate or make any changes to the plans).

II. DID THE RESPONDENT FAIL TO FURNISH OR DELAY IN FURNISHING RELEVANT INFORMATION REQUESTED BY THE UNION?

The General Counsel's complaint alleges that the Respondent has failed and refused to furnish, or delayed in furnishing, information requested by the Union that is necessary for, and relevant to, the Union's duties as the exclusive collective-bargaining representative of the Des Moines unit employees.

[46] The Union also argues that the Respondent's contract interpretation is unreasonable, because the parties' 2017 collective-bargaining agreement included the art. 17, sec. 3 pay chart, thereby overriding the Respondent's 10/31/16 notification to the Union that STD benefits were being reduced to 60-percent pay for 180 days. This argument misses the mark, because the Respondent is relying on art. 10 to justify its unilateral changes to the STD benefits. In any event, the argument ignores that the STD pay chart has been in the contract since the agreement's inception in 2003, not added to the agreement in 2017. The parties did not discuss STD benefits during 2017 negotiations, including as to whether art. 17, sec. 3 superseded the benefits outlined in Nixdorf's 10/31/16 spreadsheet of benefit changes.

An employer has the statutory obligation to provide, on request, relevant information that a union needs for the proper performance of its duties as collective-bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant, and the Respondent must provide the information. *NP Palace, LLC*, 368 NLRB No. 148, slip op. at 4 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). However, where the information requested is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate the relevance. *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997); *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). To demonstrate relevancy, a liberal, discovery-type standard applies, and the union's initial showing is not a burdensome or overwhelming one. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

Section 8(a)(5) of the Act also obligates an employer to furnish requested information which is potentially relevant to a union's evaluation and processing of grievances. *Beth Abraham Health Services*, 332 NLRB 1234, 1234 (2000). The Board does not pass on the merits of a grievance in determining whether information related to its processing is relevant. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). It is sufficient if the requested information has some bearing on the issue for which it is being sought and aids the arbitral process. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991).

In this case, the Union sought documents showing how the Respondent determined the STD payment amounts for unit employees Muhlstein, Nelsen, and Wiebelhaus, because the amounts the employees were paid differed from the payment schedule in the collective-bargaining agreement. The Union also asked for unit employees' personnel files and job descriptions, the current employee handbook, and an employee list with contact information and pay rates. The Board long has held all this information to be presumptively relevant. *Phoenix Coca-Cola Bottling Co.*, 337 NLRB 1239, 1244–45 (2002) (wages, hours, and other terms and conditions of employment of unit employees); *International Brotherhood of Firemen and Oilers, Local No. 288*, 302 NLRB 1008, 1008 (disability claim); *Bryant & Stratton Business Institute*, 323 NLRB 410, 410 (1997) (names, addresses, and telephone numbers of unit employees); *Columbia Memorial Hospital*, 362 NLRB 1256, 1267 fn. 11 (2015) (personnel files); *Maywood Do-Nut Co.*, 256 NLRB 507, 507–508 (1981) (job descriptions); *Kaweah Manor*, 367 NLRB No. 22, slip op. at 2, 3–4 (2018) (employee contact information and employee handbook applicable to unit employees). Moreover, much of this information is relevant to the Union's processing of the STD grievances, because the documents would provide the Respondent's justification for the STD payments it made to the three employees. *Grand Rapids Press*, 331 NLRB 296, 299 (2000) (information that allows a union to determine the merits of a grievance or to evaluate whether a grievance should be pursued is relevant); *Maben Energy Corp.*, 295 NLRB 149, 152 (1989) (a labor organization is "entitled to … information … to judge for [itself] whether to press [its] claim in the contractual grievance procedure or before the Board or Courts"). Save for the employee list, the Respondent failed to provide any of the requested information.

The Union also asked for documents which would show whether supervisor Patterson was performing bargaining-unit work, i.e. installations and service, in the prior 6 months. The parties' collective-bargaining agreement restricts supervisors from performing jobs "regularly performed by such members," except under certain circumstances. Farnsworth was told by employees that Patterson had been performing unit work and filed a grievance thereafter. The Union's subsequent information request again sought information that would enable it to confirm if Patterson had done so and thereby evaluate the merits of that grievance. Thus, the Union had a logical foundation and a factual basis for the requested information. *Postal Service*, 310 NLRB 391, 391 (1993). Although the Union was seeking information about a non-unit employee, the information was necessary to police the parties' contract and to determine if a non-unit employee had been performing bargaining-unit work. Thus, the information is relevant to the Union's representational duties. *Kauai Veterans Express Co.*, 369 NLRB No. 59, slip op. at 2 (2020); *United Graphics*, 281 NLRB 463, 465 (1986). The Respondent did not provide the requested documents to the Union.[47]

The Respondent argues that the Union made the information requests for the purposes of pre-trial/arbitration discovery. I do not agree. The Union submitted all the information requests prior to any of the grievances being referred to arbitration or any unfair labor practice charge being filed. In those factual circumstances, the requests do not amount to pre-trial discovery. *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 789–791 (2001) (information requests were not pre-trial discovery when made prior to the employer denying the grievances at step 3 and to the grievances being referred to arbitration); *Cf. Saginaw Control and Engineering, Inc.*, 339 NLRB 541, 544 (2003) (information request made well after union filed charge and General Counsel issued complaint was pre-trial discovery); *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992) (information requests made while unfair labor practice charges were pending was pre-trial discovery). Even after the Union referred the grievances to arbitration, the duty to supply information is continuing and did not terminate. *Jewish Federation Council of Greater Los Angeles*, 306 NLRB 507, 509 (1992). The information the Union requested would allow it to determine if it should pursue the grievances further or drop them, rather than having to play a game of blind man's bluff in its efforts to protect employees' interests. Ibid.

The Respondent also contends that Board precedent should be changed in this regard to reflect the dissenting opinion of former Chairman Peter Hurtgen in *Ormet Aluminum Mill Products*, supra. Chairman Hurtgen opined that a union is engaged in pretrial discovery when it continues to seek requested information related to a grievance after the grievance is referred to arbitration.[48] He also noted that information requests which seek the reasons for an employer's actions likewise amount to pretrial discovery, because they essentially are

[47] Farnsworth may have received Patterson's performance appraisal prior to the hearing, but he requested that document for a different issue. (Tr. 175–77.) Nixdorf also told Farnsworth on December 9 that he would notify Farnsworth when he had the information together for the Patterson request, but he was not sure it was readily available. However, Nixdorf never provided any information to Farnsworth thereafter.

[48] The record establishes only that the Muhlstein STD grievance and the Patterson grievance were referred to arbitration.

interrogatories. Even if I agreed with Chairman Hurtgen's view, it is an administrative law judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). It is for the Board, not the judge, to determine whether precedent should be varied. Under the majority opinion in *Ormet*, the Union's information requests did not constitute pre-trial discovery.

Finally, the Respondent contends that the Union's conduct establishes it was engaged in pre-trial discovery, rather than seeking information to evaluate the grievances. The Respondent points to Farnsworth holding a meeting with bargaining-unit members and, within just over a month thereafter, filing a total of five grievances and moving them to the arbitration level, as well as filing five information requests, for a Des Moines workforce of 10 people. I find no merit to this contention. In late November, employees notified Farnsworth about the STD payment issue and the issue of Patterson doing bargaining-unit work. He immediately filed grievances and information requests to address those employee concerns. In a short timeframe, he repeatedly followed up on the requests. That reflects a union representative diligently, albeit aggressively, performing his job. If the Respondent had an issue with the volume of documents being sought or needed more time to collect them, it could have raised the issues with the Union, but it failed to do so. The Respondent has not demonstrated that the information requests were overly burdensome. See *Pulaski Construction Co.*, 345 NLRB 931, 937 (2005).

I conclude the Respondent violated Section 8(a)(5) by refusing to provide the Union with relevant, requested information, as alleged in the General Counsel's complaint.[49]

III. DID THE RESPONDENT REFUSE TO PROCESS GRIEVANCES?

The General Counsel's last complaint allegation is that the Respondent failed to continue in effect all terms and conditions of the parties' collective-bargaining agreement by failing and refusing to continue processing the STD and Patterson grievances, thereby violating Section 8(a)(5) and (1).[50]

An employer's refusal to arbitrate grievances pursuant to a collective-bargaining agreement violates Section 8(a)(5), if the employer's conduct amounts to a unilateral modification of terms and conditions of employment during the contract term. *Velan Valve Corp.*, 316 NLRB 1273, 1274 (1995), citing *Southwestern Electric*, 274 NLRB 922, 926 (1985). Where there is a refusal to arbitrate all grievances, or where the refusal to arbitrate a particular class of grievances amounts to a wholesale repudiation of the contract, a violation will be found. *ACS, LLC*, 345 NLRB 1080, 1081 (2005); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987).

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[49] Although the complaint also alleged a delay in providing information, the record evidence does not establish when the Union received the employee list, the one piece of information the Respondent provided. Farnsworth could not say when that occurred. (Tr. 95–96.) Therefore, I do not find that separate violation.

[50] The complaint alleges that this conduct was done "without notice and bargaining with the Union," i.e. a unilateral change in unit employees' working conditions.

Conversely, if the refusal to arbitrate is limited to a single grievance or a specifically defined, "narrow class" of grievances, Section 8(a)(5) is not violated. *GAF Corp.*, 265 NLRB 1361, 1365 (1982); *Mid-American Milling Co.*, 282 NLRB 926, 926 (1987).

Prior to applying the standard here, a brief factual summary regarding the processing of each grievance is in order, extricated from the other issues and communications in this case. Regarding the STD grievances, Muhlstein filed the first one on November 7 and received a step 1 answer from the Respondent the next day. The Union moved that grievance to step 2 on November 11. The Respondent denied the grievance on November 12, based upon the article 10 "comparable benefits" language and the changes the Respondent made to STD benefits in 2017. On November 18, the Union moved the grievance to step 3. Under the contractual procedure, the Respondent's answer at step 3 was due on November 28 but no answer was filed as of that date, meaning the Union was free to move the grievance to arbitration thereafter. On December 6, the Union notified the Respondent of its intent to do so and, on December 18, it filed a demand for arbitration. On December 19, after receiving that demand, the Respondent advised the Union that Muhlstein's STD grievance was not arbitrable because article 4, section 2 of the contract excluded from arbitration any dispute which directly or indirectly involved the interpretation or application of the disability benefit plans. On December 31, the Union asked if the Respondent's position that Muhlstein's STD grievance was not arbitrable meant the company was refusing or waiving the right to arbitrate the grievance. On January 3, 2020, the Union sent the Respondent a panel of arbitrators to strike for the Muhlstein STD grievance.

The Union filed the Nelsen and Wiebelhaus STD grievances on November 19.[51] Receiving no response within the 5 days allotted by the contract, the Union moved those grievances to step 2 on November 25. The Respondent had until December 6 to respond under the contract, but the Union went ahead and moved the grievances to step 3 on December 3. Working from the December 6 response deadline, the Union was free to refer the grievances to arbitration as of December 16. On December 31, the Union notified the Respondent of its intent to do so, but never thereafter referred the grievances to arbitration. On that same date and again on January 9 and 27, 2020, the Union asked the Respondent if it also was contending the Nelsen and Wiebelhaus grievances were not arbitrable. The Union filed its unfair labor practice charge alleging the Respondent had frustrated the parties' grievance and arbitration process on January 27, 2020. On February 2, 2020, the Respondent reiterated to the Union its position that all the STD grievances were not arbitrable under the contract, but said it was willing to submit that question to an arbitrator.

Finally, the Union filed the Patterson-doing-bargaining-unit-work grievance on November 19, alleging a violation of article 8 of the contract.[52] The Company did not respond

[51] Farnsworth submitted the grievances to Patterson, the direct supervisor; Huffman, the regional general manager; and Nixdorf, the director of labor relations. Farnsworth treated the filings as the written filing in step 1 of the grievance procedure.

[52] Again, Farnsworth sent the grievance to Patterson, Huffman, and Nixdorf, suggesting this was step 1 in the grievance procedure.

by the contractually based November 29 due date. Instead, on December 2, the Respondent asked the Union for the specific contract provision the Union was alleging was violated, even though that information was contained in the grievance itself. On December 9, the Union reiterated its position that Patterson's conduct violated article 8. That same date, the Respondent notified the Union that the information the Union requested for the grievance was not readily available and the Respondent would get back to the Union when it was put together. On December 31, the Union notified the Respondent that it was referring the Patterson grievance to arbitration and, on January 2, 2020, the Union did so. On February 2, 2020, the Respondent asked the Union for the Patterson grievance arbitration panel for striking. On February 24, 2020, the parties discussed dates for striking a panel and, on February 28, 2020, agreed to a time to do so. Ultimately, they selected an arbitrator for the grievance.

Given these facts, I conclude the Respondent has not unlawfully refused to process these grievances. The three STD grievances involve the same contractual issue, making them a specifically defined, narrow class of grievances. As noted above, the refusal to process only a narrow class of grievances does not violate Section 8(a)(5). In any event, although the Respondent has refused to process the substantive merits of the STD grievances, it is willing to utilize the contractual arbitration procedure to resolve the procedural arbitrability question. The Union could have accepted that offer and gone to arbitration. Instead, it chose to continue with its unfair labor practice charge with the Board. The Union was free to do so, but that choice neither negates the Respondent's offer nor renders the Respondent's refusal to arbitrate the substantive merits of the STD grievances unlawful. Rather, the Respondent's willingness to arbitrate the arbitrability of the STD grievances precludes a finding that it repudiated the contractual grievance-arbitration procedure.[53] *Miller Compressing Co.*, 309 NLRB 1020, 1022–1023 (1992) (employer did not repudiate a contractual arbitration clause when it refused to arbitrate discharge grievances due to its belief that no bargaining agreement was in effect on the day of the discharges, but offered to proceed to arbitration on the arbitrability of the grievances); *Bacardi Corp.*, 286 NLRB 422, 423 (1987) (employer did not repudiate arbitration process where it was willing to submit the question of arbitrability of post-expiration grievances to an arbitrator). As for the Patterson-doing-bargaining-unit-work grievance, the Respondent agreed to arbitrate it and the parties have selected an arbitrator. Although it may not have responded to the grievance prior to the Union referring it to arbitration, the contractual grievance procedure did not require a response and allowed the Union to move the grievance forward once the Respondent's time period for answering expired. And the Respondent never refused to arbitrate the Patterson grievance. This does not amount to a refusal to process all grievances or a wholesale repudiation of the contract.

Relying on *Paramount Potato Chip Co., Inc.*, 252 NLRB 794, 797 (1980) and *Independent Stave Co.*, 233 NLRB 1202, 1204 (1977), the General Counsel argues the Respondent's conduct is

[53] Under federal law, disputes about the appropriateness of arbitration are subdivided into two categories: "procedural arbitrability" and "substantive arbitrability." Under the Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555–559 (1964), disputes over "procedural arbitrability" must be submitted to arbitration for resolution.

unlawful, because the company failed to process more than just a narrow class of grievances and provided no information in relation to the grievances. The facts in those cases are distinguishable from this matter. In *Paramount Potato Chip*, an employer modified the contractual grievance and arbitration procedure when its president refused to arbitrate at least 20 grievances over roughly 4 months alleging various contract violations. Here, the Respondent has not refused to arbitrate any grievance. In *Independent Stave*, an international union and a corresponding local were parties to a contract covering certain unit employees with a grievance and arbitration procedure. In contract negotiations one year, the parties added the following sentence to the procedure: "The processing of grievances and arbitrations shall be solely handled by the Local Union." Thereafter, the employer insisted on receiving an affidavit from the local union stating that the international had not participated in grievance processing and the local union would pay all the grievance and arbitration expenses. Because the contract terms made no mention of such a condition precedent and because the international union itself was a bargaining representative, the Board adopted the judge's conclusion that the employer's demand constituted a unilateral contract modification. In contrast here, the Respondent's insistence on having an arbitrator decide the arbitrability of the STD grievances is grounded (again) in a colorable interpretation of contractual language. Article 10 incorporates the Respondent's disability plan into the parties' contract, setting forth STD benefits under the STD policy which conflict with the STD benefit amounts contained in article 17, section 3 of the contract. The parties dispute which of the two contractual benefit amounts unit employees should receive. Moreover, article 4 excludes from arbitration any dispute which either directly or indirectly involves interpretation or application of the STD plan. It is not clear whether that language applies to the parties' dispute here. As a result, the Respondent's insistence on resolving the procedural arbitrability question first is understandable and not unlawful. *GAF Corp.*, 265 NLRB at 1364–1365 (employer's refusal to arbitrate pension benefits grievance under collective-bargaining agreement was not unlawful, where employer explained it believed the dispute must be resolved under the procedure in its separate pension agreement with the union and employer was willing to submit the dispute under that procedure).

Without citation to authority, the General Counsel and the Union also fault the Respondent for delaying in responding to grievances and wholly ignoring certain steps in the grievance process. However, as previously noted, the parties' contract did not require responses at each stage of grievance processing. It simply set time limits for responding and allowed the Union to proceed forward with a grievance if the Respondent did not provide a timely response. If the Respondent chose the latter route, especially with the number of grievances, information requests, and letters the Union submitted over the course of just over a month during the holiday season for a small bargaining unit, the contract permitted the Company to do so. As for arbitrating the grievances, the Respondent did take approximately 1 month to get back to the Union, after the Muhlstein STD and Patterson grievances had been referred to arbitration. That cannot be classified as an expedient response but, in the field of labor relations, it also cannot be viewed as excessive.

Accordingly, I conclude the Respondent did not violate Section 8(a)(5) by refusing to process or arbitrate grievances or by otherwise wholly repudiating the parties' grievance and

arbitration procedure. I recommend that the General Counsel's allegation in this regard be dismissed.

CONCLUSIONS OF LAW

1. Respondent ADT Security Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 347 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit:

> All full-time installers and maintenance employees of the Respondent at its Des Moines, Iowa facility, excluding all employees classified by the Respondent as office clerical employees, professional employees, customer service employees, sales employees, guards, and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with relevant information the Union requested on November 25, 2019 and December 3, 2019.[54]

5. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not violated the Act in any of the other manners alleged in the complaints.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent must cease and desist from refusing to provide the Union with requested information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Respondent's installers

[54] The Board has held a violation of Sec. 8(a)(5) is also a derivative violation of Sec. 8(a)(1) of the Act. See *Bemis Co.,* 370 NLRB No. 7, slip op. at 1 fn. 3 (2020); *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 51 fn. 49 (2020).

and maintenance employees. The Respondent also must provide, to the extent it has not, the Union with the information the Union requested on November 25, 2019 and December 3, 2019.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

Respondent ADT Security Services, Inc., Des Moines, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Refusing to bargain collectively with the International Brotherhood of Electrical Workers Local 347 (the Union), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's unit employees.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) To the extent not already provided, furnish to the Union in a timely manner the information requested by the Union on November 25, 2019 and December 3, 2019.

   (b) Within 14 days after service by the Region, post at its Des Moines, Iowa facility copies of the attached notice marked "Appendix."[56] Copies of the notice, on

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[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[56] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., December 18, 2020.

Charles J. Muhl
Administrative Law Judge

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers Local 347 (the "Union") by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information that it first requested on November 25, 2019 and December 3, 2019, to the extent we have not already done so.

ADT SECURITY SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Federal Office Building, 212 3rd Avenue S, Suite 200 Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at http://www.nlrb.gov/case/18-CA-253853 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.